



FILED

Dec 16 2008, 9:53 am

Beverly Smith

CLERK

of the supreme court,
court of appeals and
tax court

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 3
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0707-FC-131679

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Kourtney Cohen (Cohen), appeals his sentence for three counts of operating a vehicle while intoxicated (OWI) causing death, as Class C felonies, Ind. Code § 9-30-5-5, and one count of OWI causing serious bodily injury, as a Class D felony, I.C. § 9-30-5-4.

We affirm.

ISSUE

Cohen presents one issue for our review: Whether his sentence is inappropriate.

FACTS AND PROCEDURAL HISTORY

Cohen admitted to the following facts at his guilty plea hearing. At approximately 3:00 a.m. on July 1, 2007, Cohen, an unemployed eighteen-year-old who had dropped out of high school after ninth grade and who had never received a driver's license, was driving a Cadillac Escalade east on 38th Street in Indianapolis, Indiana, after leaving a bar.¹ Earlier, he had been drinking vodka and smoking marijuana. Cohen ran a red light at Lafayette Road and collided with a northbound Dodge Durango in the intersection. The collision propelled the Durango into a Chevrolet Aveo that was sitting in the westbound lane of 38th Street.

A witness estimated that Cohen was traveling between 100 and 120 miles per hour at the time of the collision. A police blood draw indicated a blood alcohol concentration of .12 grams of alcohol per 100 milliliters of blood, a hospital blood draw indicated a blood alcohol

¹ Cohen gained entrance to the bar by paying extra money to the doorman.

concentration of .209 grams of alcohol per 100 milliliters of blood, and a controlled substances test revealed the presence of marijuana metabolite.

The driver of the Durango was killed and burned beyond recognition but later identified as Ivan Vega (Vega). Vega's passenger, Jose Luis Agustin-Hermenegildo (Agustin-Hermenegildo), also died, as did Cohen's own passenger, Michael Cook (Cook). Bradley Finch (Finch), the driver of the Aveo, was knocked unconscious.

On July 9, 2007, the State filed an Information charging Cohen with: Count I, OWI causing death (Cook), as a Class C felony, I.C. § 9-30-5-5; Count II, operating a vehicle with an alcohol concentration of .08 or higher causing death (Cook), as a Class C felony, I.C. § 9-30-5-5; Count III, OWI causing death (Agustin-Hermenegildo), as a Class C felony, I.C. § 9-30-5-5; Count IV, operating a vehicle with an alcohol concentration of .08 or higher causing death (Agustin-Hermenegildo), as a Class C felony, I.C. § 9-30-5-5; Count V, OWI causing death (Vega), as a Class C felony, I.C. § 9-30-5-5; Count VI, operating a vehicle with an alcohol concentration of .08 or higher causing death (Vega), as a Class C felony, I.C. § 9-30-5-5; Count VII, OWI causing serious bodily injury (Finch), as a Class D felony, I.C. § 9-30-5-4; and Count VIII, operating a vehicle with an alcohol concentration of .08 or higher causing serious bodily injury (Finch), as a Class D felony, I.C. § 9-30-5-4.

On April 18, 2008, Cohen and the State entered into a plea agreement by which Cohen would plead guilty as charged to Counts I, III, V, and VII and the State would dismiss the remaining counts. The agreement also contained the following provision regarding sentencing:

13 year sentence with 13 years executed open argument as to placement with the executed time to be allocated in the following manner:

Count I: 4 years executed
Count III: 4 years executed
Count V: 4 years executed
Count VII: 1 year executed

All counts to be served consecutive

(Appellant's App. p. 58).

On April 28, 2008, the trial court accepted the parties' plea agreement and held a sentencing hearing. The trial court found several mitigating circumstances: (1) Cohen accepted responsibility and pled guilty; (2) Cohen's young age; (3) Cohen's lack of adult criminal history (though the court noted that Cohen had only been an adult for a short while and that he had committed disorderly conduct as a juvenile); and (4) Cohen expressed genuine remorse. The trial court also identified a number of aggravating circumstances: (1) multiple victims; (2) Cohen was speeding at the time of the collision; and (3) Cohen did not have a driver's license. The trial court determined that the aggravating circumstances outweigh the mitigating circumstances.

Because the plea agreement called for a thirteen-year executed sentence, the only decision the trial court needed to make was where Cohen will serve his time. The trial court ordered Cohen to serve the entire sentence in the Department of Correction, stating:

You now need, (1) to suffer the consequences for those crimes you've committed, and (2) some serious structure in your life so that you never go down this path again. It would absolutely be inappropriate of me to just send you over to a Community Corrections program right now, without you seeing the inside of the Department of Correction[]. You have to go to the Department of Correction[] at this point in your sentence because you have to

see what's going on with the rest of your life if you don't choose to straighten up.

Fortunately for you, you have – even if you serve all 13 years in the Department of Correction[], you have the opportunity to get out and to make a life for yourself and to move on with your life and have a very full adulthood. You have that opportunity. These people don't.

You have to show me that you're really going to make something of that opportunity before I will ever consider changing that placement from the Department of Correction[] to any other placement.

One of the things that you have to do in the Department of Correction[] is obtain your GED and work towards higher education, which the DOC is fully able and willing to provide to its inmates.

You also must take advantage of each and every substance abuse treatment program that the DOC offers you where you are at. You must participate, and you must successfully complete those programs.

Not only will that help you, if you are genuine about your rehabilitation, but it all will encourage you within the DOC, because you will earn credit time for some of those classes. It also will show me that perhaps you have taken this seriously, you are wanting to make changes in your life, and you may be someone who would benefit from transitioning towards the end of your sentence.

I am not going to give you false hopes. You have a 13-year sentence. I am ordering it all served at the Department of Correction[] right now.

As far as what I would consider for an alternate placement and when, you must serve at least 10 years of that placement before I will consider any transition to an alternate placement.

(Transcript pp. 119-21).

Cohen now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Cohen argues that his sentence is inappropriate under Indiana Appellate Rule 7(B). Because the duration of Cohen's sentence was fixed by his plea agreement, he

only challenges the trial court's decision to order the entire sentence served in the Department of Correction.²

Indiana Appellate Rule 7(B) permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See also Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). The location where a sentence is to be served is an appropriate focus of 7(B) review. *See Biddinger v. State*, 868 N.E.2d 407, 414 (Ind. 2007). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080. Cohen has failed to carry that burden.

As for Cohen's character, we have seen worse. He has no previous criminal convictions, only a true finding for disorderly conduct as a juvenile. Moreover, as the trial court noted, Cohen accepted responsibility for this incident and expressed genuine remorse. On the other hand, Cohen was by no means a model citizen. He dropped out of school after ninth grade but did not go to work full-time, except for a two-month period just before the collision. He admitted at the sentencing hearing that it was common for him to purchase

² In his Summary of Argument, Cohen asserts that the trial court's decision regarding placement "constituted an abuse of the trial court's discretion." (Appellant's Br. p. 11). There are two problems with this statement. First, the abuse of discretion claim in Cohen's Summary of Argument is inconsistent with the Argument section of his brief, which alleges that his placement is inappropriate. "[I]nappropriate sentence and abuse of discretion claims are to be analyzed separately." *King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008). In other words, "an inappropriate sentence analysis does not involve an argument that the trial court abused its discretion in sentencing the defendant." *Id.* Second, to the extent that Cohen is seeking to also make an abuse of discretion argument, the location where a sentence is to be served is not subject to review for abuse of discretion. *Id.*

alcohol and go to bars even though he was underage. His marijuana use and his decision to drive without a license also reflect poorly on his character.

More troubling, though, is the nature of Cohen's offenses. Cohen, who, again, has never obtained a driver's license, got behind the wheel of a large SUV after smoking marijuana and drinking vodka. He sped down a busy city street at, by at least one estimate, 100-120 miles per hour, obviously well in excess of the speed limit, then ran a red light, causing a collision involving two other vehicles. As a result of Cohen's actions, three people died and one person was seriously injured. We concur in the trial court's sentiment that a significant prison term is justified by the egregious nature of Cohen's actions and the tragic consequences of those actions.³

Only in very rare cases, if ever, will we find a specific placement to be inappropriate, as trial courts know better than we the feasibility of alternative placements in particular counties or communities. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). This is not one of those rare cases.

³ The trial court spoke at length during the sentencing hearing about the possibility that it will eventually alter Cohen's placement. Whether the trial court would actually have the authority to do so is irrelevant for purposes of this appeal, as we conclude that even a full thirteen-year term in the DOC would not be inappropriate.

CONCLUSION

Based on the foregoing, we conclude that Cohen's sentence is not inappropriate.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.